January 22, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" – WT Docket No. 03-128

Dear Ms. Dortch:
On Thursday, January 22, 2004, the undersigned, counsel to the Wireless Coalition to Reform Section 106 met with the following Commission officials:

Jeffrey Steinberg	Wireless Telecommunications Bureau ("WTB")
Aliza Katz	Office of General Counsel ("OGC")
Lee Martin	OGC

At this presentation, Commission officials said that the purpose of the meeting was to discuss with counsel some of the legal justifications and authority that might support amending the Nationwide Programmatic Agreement ("NPA") that is the subject of this proceeding, to address the issue of the treatment of potentially eligible properties. This is the issue raised in the letter recently sent to John Nau, Chairman of the Advisory Council on Historic Preservation ("ACHP"), by House Resources Committee Chairman Richard Pombo and National Parks Subcommittee Chairman George Radanovich (the "Pombo/Radanovich letter").

The issues discussed included: (1) the legal justification for making the required changes to the NPA without issuing a further notice of proposed rulemaking; (2) the scope of potentially eligible properties allowed in the NHPA and federal court treatment of this issue; (3) the ability of the NPA to treat telecommunications properties differently than other agencies treat their undertakings under Section 106 of

the National Historic Preservation Act ("NHPA"); and (4) the possible effect on tribal interests of the proposed change to the NPA.

The undersigned submitted the document attached hereto as Attachment 1 to Ms. Katz, Mr. Steinberg and Ms. Martin via email after the presentation.

Respectfully submitted,

John F. Clark
Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

Attachment 1

-----Original Message-----

From: Clark, John F. - WDC

Sent: Thursday, January 22, 2004 12:13 PM

To: Aliza F. Katz (E-mail); 'lee.martin@fcc.gov'

Cc: Jeffery Steinberg (E-mail)

Subject: NMA v. Slater Article

Aliza and Lee,

As requested in our meeting today, attached is a copy of an article that I wrote in 2001 for "Telecommunications Real Estate Adviser."

Please let me know if you have any trouble opening the attached Word file.

Sincerely,

John

Sorting Out Winners and Losers in the Case of NMA v. Slater

by John F. Clark

Published in "Telecom Real Estate Adviser" - December, 2001

This past September, when the court handed down its ruling in the case of National Mining Association and Cellular Telecommunications and Internet Association v.

Slater,[i] many recognized the case as an important victory for defendant Advisory Council on Historic Preservation ("Advisory Council").

After all, plaintiffs National Mining Association ("NMA") and Cellular Telecommunications and Internet Association ("CTIA") had had failed to convince the court to overturn the Advisory Council's rules governing the Section 106 process of historic review (the "Section 106 rules") under the National Historic Preservation Act ("NHPA")[ii] on the ground that the Advisory Council had no power to control other federal agencies. The district court flatly rejected that argument and declared that the Advisory Council had full authority to promulgate binding procedural regulations implementing Section 106. Then, except for a few threshold procedural claims, the court granted summary judgement in favor of the Advisory Council on nearly every remaining count, invalidating only two tiny sections of the Section 106 rules.

Because the court sustained the Advisory Council's authority and upheld nearly all of the Section 106 rules, the case was undeniably a victory for the Advisory Council. On closer examination, however, the court's ruling may have granted more to the plaintiffs than some originally thought. Moreover, questions raised by the court's ruling on the issues of "eligibility determinations" and "substance versus procedure," may have left the Section 106 rules vulnerable to future legal challenge. In addition, the case has revealed a potentially serious problem resulting from the Advisory Council's long-standing policy of requiring federal agencies, through their Section 106 responsibilities, to take a primary role in the identification and evaluation of historic properties.

What the Advisory Council Won

NMA and CTIA challenged the Advisory Council's rules on numerous grounds, focusing heavily on points involving the authority and role of the Advisory Council under the NHPA.[iii]

The court ruled that amendments to the NHPA in 1976 and 1992, granting the Advisory Council the power to "promulgate such rules and regulations as it deems necessary to govern the implementation of [Section 106]. . ." and adding the phrase "in its entirety," gave the Advisory Council the authority to issue binding procedural regulations governing how agencies must take into account the effect of their undertakings on historic properties.[iv]

The Court flatly rejected arguments that the Advisory Council's rules impermissibly expanded Section 106, either by including state and local government activities in the definition of "undertakings," or by requiring agencies to make independent determinations of the eligibility of properties to the national register of Historic Places ("National Register").[v] The court agreed with the Advisory Council that the Council's rules governing consultation with Indian tribes, though stemming from sections of the NHPA other than Section 106, were nevertheless part of the Section 106 process and so within the Advisory Council's rulemaking authority.[vi] The Court also rejected as "baseless" CTIA's argument that the Section 106 rules conflicted with and repealed by implication other federal laws, such as the Communications Act of 1934.[vii]

The court also made short work of plaintiffs' three constitutional claims. First, it rejected the claim that the rule's criteria for identifying adverse effects were void for vagueness.[viii] The Court contradicted this assertion, saying that "defendants have done a laudable job of enumerating criteria for adverse effects in a field – historic preservation – that involves intangibles and inexact, subjective elements."[ix] The Court also said that plaintiffs had not cited factual situations where the rule had resulted in confusion.[x]

Second, the court rejected the plaintiffs' argument that the rules granted special preferences to the religious practices of Native Americans and Hawaiians in violation of the Establishment Clause. The Court explained that the Final Rule met all three prongs of the test set by the Supreme Court: (1) it has a secular purpose; (2) it neither advanced nor inhibited religion; and (3) it did not foster excessive government entanglement with religion.[xi]

Third, and most interestingly, the court rejected plaintiffs' claim under the Appointments Clause. In doing so, the court implied that it might have ruled for the defense even if the two Advisory Council members not appointed by the President had not recused themselves from the re-vote on the rule expressly to defend against this claim. After the NMA first brought this claim in early 2000, the Advisory Council informed the court that it would re-promulgate the rule but this time without the participation of two *ex officio* members of the Advisory Council who were not appointed by the President, as the Constitution requires of all officers that exercise the executive power of the federal government.[xii] The re-promulgation was accomplished quickly, and the new rule was published on December 12, 2000, effective January 11, 2001.[xiii] Although the Advisory Council never expressly admitted that the

participation by these two members in previous rulemaking votes violated the Constitution, the hasty re-promulgation strongly suggested their position.

In its opinion, however, the Court ignored the recusal defense and went directly to the heart of the claim, finding that the Advisory Council's role in promulgating procedural regulations governing the effects of federal undertakings on historic properties "could not be further from that which was at issue" in the landmark case of Buckley v. Valeo,[xiv] which the court said was plaintiffs' sole legal support on this issue.[xv] Thus, the court rejected the Appointments Clause argument implying it would have done so even if the two non-presidentially appointed members had participated in the vote on the new rule.

Significantly, the Court ruled that in its interpretation of the sections of the NHPA that it was empowered to implement, the Advisory Council was entitled to the deferential standard of review announced in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[xvi] In Chevron, the U. S. Supreme Court said that in evaluating an agency's construction of a statute, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[xvii] In this case, the Court made use of this deferential standard to the great benefit of the Advisory Council, particularly on the eligibility-determination issue, addressed below.

Finally, as described in greater detail below, the court decided that nearly all of the challenged sections of the Section 106 rules were procedural, not substantive, and therefore within the permissible range of authority for the Advisory Council.[xviii]

What NMA and CTIA Won

The plaintiffs in this case did not go away empty-handed. In fact, they may have gotten more out of the case than many thought they did. Indeed, although it has not been widely recognized, the court's ruling conferred on the FCC substantial new power in the Section 106 process.

First, the plaintiffs won on the threshold procedural issues of standing and ripeness. These may seem to be relatively minor victories, but it is worth noting that the government mounted a vigorous defense on these issues and sought to have the suits dismissed out of hand.[xix] Future plaintiffs in similar cases will surely seek to take advantage of this court's ruling that standing may be established where the plaintiff include economic injuries such as "delay, cost and expensive uncertainty," and where

the Advisory Council authorized another agency's "injurious conduct". In other words, it was immaterial to the standing question that the cause of delay and extra cost to plaintiffs' members were only indirectly caused by the Section 106 rules. Rather, they were the direct result of procedures and actions of State Historic Preservation Officers ("SHPOs") or the federal agency.

Second, although the court upheld nearly all of the individually challenged sections of the Advisory Council's Section 106 rules, it did strike down two specific sections that allowed the Advisory Council to overrule the FCC's determinations of "no effect on historic properties" and "no adverse effect." The court ruled that because these two sections allowed the Advisory Council to review and effectively reverse agency determinations, these were impermissible "substantive" regulations that directly interfered with the agency's exercise of its right to make these determinations, a right expressly granted to it by Congress. [xx]

Section 800.4(d)(2)[xxi] is one of the rules struck down by the court. This section provided that either a SHPO, a Tribal Historic Preservation Officer ("THPO") or the Advisory Council could overrule an agency finding of "no historic properties affected." Under this section, the objection of any one of these entities to such a finding meant that the opinion of the SHPO/THPO or the Advisory Council trumped the opinion of the agency. The Section 106 process would then progress under the assumption that there were eligible properties potentially affected by the undertaking. This, in turn, would force the agency to evaluate under the procedures of Section 800.5 whether or not the effect would be "adverse." The court's ruling invalidated Section 800.4(d)(2), restoring the agency's prerogative to make its own finding and to control this stage of the process.

For similar reasons, the court also invalidated Section 800.5(c)(3), which allowed the Advisory Council to overrule an agency finding of "no adverse effect." In cases where the Section 106 process requires evaluation of effects, Section 800.5(c)(2) requires that if the agency finds that the potential effect will not be adverse, it must submit that finding to the SHPO/THPO and any Indian tribe that is involved in the process.[xxii] Prior to this case, if the SHPO/THPO disagreed with the agency's "no adverse effect" finding, the agency had to either convince the SHPO/THPO to withdraw its objection or request that the Advisory Council review the finding under Section 800.5(c)(3).[xxiii] Likewise, if a participating Indian tribe disagreed with the finding, it could request Advisory Council review under that section.[xxiv] In addition, the Advisory Council could request to review the finding on its own initiative.[xxv]

The now-invalid Section 800.5(c)(3) provided that once the Advisory Council's review had been requested, the Advisory Council would make its own finding and that the agency "shall proceed in accordance with the Council's determination." That meant that the Advisory Council had the power to overrule the agency's determination. The agency would then be forced to mitigate adverse effects that it had previously found did not exist. As with Section 800.4(d)(2), the court invalidated Section 800.5(c)(3) because this section directly interfered with the agency's right to make its own determination of whether or not an effect is adverse.[xxvi]

Thus the court's ruling created two new "off ramps" from the Section 106 process that did not exist before. That is, the court's ruling allows the agency to terminate the Section 106 process when its own findings permit, and neither the Advisory Council nor the SHPO/THPO can now overrule those findings. This ruling therefore infuses the action agency's role in the Section 106 process with substantial new power.

Questions Remaining After NMA v. Slater.

The NMA v. Slater case provided answers to several questions. It also raised new ones and left others unanswered. The following are some of the most potentially significant:

1. Can the FCC take advantage of its new power? Under the FCC's rules and procedures, the Commission delegates to its applicants the duty to perform the information gathering and site review procedures necessary to comply with the National Environmental Policy Act (NEPA")[xxvii] and NHPA.[xxviii] Thus, under FCC rules, applicants and their qualified consultants do the necessary identification and evaluation legwork, consult with appropriate expert agencies and then submit written reports to the FCC with proposed conclusions. The Commission reviews these reports, but because it employs no qualified cultural resource professionals, either in the field or at headquarters, the Commission relies heavily on the concurrence of SHPOs for its Section 106 findings. This has raised problems in the past when SHPOs have refused to consult, obstructed the process or acted in other ways that applicants alleged were unreasonable.

As a practical matter, in order for the Commission to be able to take advantage of the new power granted by NMA v. Slater in a way that will enjoy confidence, it must employ trained and experienced personnel to handle historic preservation and cultural resource matters. Otherwise it will be difficult for the agency to stand up to SHPOs

or to assert the correctness of its own findings of "no effect" or "no adverse effect," even in the clearest cases. In order for the FCC to have practical access to the new "off ramps," therefore, it must have the qualified personnel who can make the evaluative decisions with confidence and, in appropriate cases, steer harmless undertakings out of the Section 106 process.

2. Substance versus procedure. In deciding the question of the exact scope of the Advisory Council's authority, the court ruled that the plain language of the NHPA makes clear that Congress gave the Advisory Council the power to promulgate procedural regulations describing how agencies must "take into account" the impact of their undertakings on historic properties.[xxix] Conversely, as both NMA and the Advisory Council in this case agreed, Congress gave the Advisory Council no power to promulgate substantive regulations that would force ultimate agency action.

The court noted that this "unenviable task" of distinguishing between procedure and substance is one that courts have long recognized as fraught with difficulty.[xxx] The D.C. Circuit Court of Appeals has acknowledged that "the impossibility of drawing a clear bright line between substance and procedure leads to predictable confusion."[xxxi] In that case, the court cited Justice Felix Frankfurter who observed:

> "Substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."[xxxii]

For assistance in drawing the line between rules that are procedural and those that are substantive, the Court turned to the area of labor law and a line of cases from the D.C. Circuit that decided questions of which proposals made in the course of labor negotiations were procedural, and therefore negotiable, or substantive, and thus non-negotiable. Although the principles lifted from these cases and applied to the Advisory Council's Section 106 rules seem to fit well enough and certainly support the court's decision, the very difficulty of the task raises a question as to whether these principles are really that portable, and whether they might not need tailoring to appropriately cover the area of historic preservation rules. If, as Justice Frankfurter observed, the terms "substance" and "procedure" each imply different variables depending upon the particular problem. Perhaps a more detailed analysis based on a

more illuminating factual record is warranted before applying the labor law principles directly to historic preservation rules.

For example, the court here cited language from the preamble to the Section 106 rules stating that "[n]owhere does the rule impose an outcome on a Federal agency as to how it will decide whether or not to approve an undertaking, or how."[xxxiii] But the ultimate approval or disapproval of an undertaking was not at issue in this case, except indirectly. The court points out that under Section 106, both the right and the duty delegated to each agency is to "take into account the effect" of that agency's undertakings on historic properties.[xxxiv] It is clear that the Section 106 rules dictate in great detail how that duty should be exercised. Indeed, the rules specify not only the procedure to be used but also the eligibility and the adverse-effect criteria to be applied in taking effects into account.[xxxv]

As the cases relied on by the court in NMA v. Slater point out, there is a distinction between purely procedural proposals and "cases in which proposals cast in procedural language impinge on substantive management decisions by specifying the criteria pursuant to which decisions must be made."[xxxvi] According to the D.C. Circuit Court, the latter cases "stand close to the uncertain border between procedure and substance . . ." and should be considered substantive where they "directly interfere" with managements exercise of a reserved right."[xxxvii] It would seem that, in specifying detailed decision making criteria, the Section 106 rules also stand close to that uncertain border.

The court made the point that any rules may still be seen as procedural, although they "contribute to the procedural complexity of the Section 106 process" or delay "the exercise of a management right."[xxxviii] However, the "directly interfere" test requires an analysis of the actual requirements imposed on an agency in the exercise of its protected rights. The Section 106 rules impose a new, complex and detailed procedural scheme that has yet to be fully tested. Even though there are scattered reports of procedural abuse, we have not yet seen the lengths to which it may force the Commission and its applicants to go, or the extent of the costs and delay it might impose. It is worth noting, at least in the labor context relied upon by the court in NMA v. Slater, that "when a proposal stipulates procedures that so affect the environment within which an agency is allowed to act that it places the equivalent of a substantive restraint on its ability to act, that proposal has forfeited its claim to procedural purity."[xxxix] It may be that experience with these rules will disclose that

the procedures affect the environment in which the FCC is allowed to act in just that way.

As it was required to do, the court in NMA v. Slater drew a line between substance and procedure in the Section 106 rules. The line that the court drew allowed most of the new Section 106 rules to survive. But the line admittedly is uncertain, and it is not clear that the court had the record required to give adequate definition or weight to agency prerogatives. In this facial challenge, the court had little evidence of how the rules were being applied. In a difficult conceptual area, this pivotal, first application of a labor-law framework to historic preservation rules deserves further study and perhaps additional testing in court under a different record.

3. Potential Eligibility. Section 106 states that agencies must take into account the effect of their undertakings on properties "included in or eligible for inclusion in" the National Register. The court rejected plaintiffs' argument that the Section 106 rules impermissibly expand the scope of the NHPA by extending its procedures to properties that are only "potentially eligible" for the National Register.

The court admitted that the rules require the agency to identify three categories of properties: (1) those that are included in the National Register; (2) those that are eligible for inclusion; and (3) those that may be eligible for inclusion.[xl] This characterization alone would seem to take potentially eligible properties outside the ambit of "eligible properties." that are the only properties mentioned in Section 106.

The court went on, however, to assert that the term "eligible for inclusion in the National Register" is a "term of art, based on regulations issued by the National Park Service (NPS)."[xli] The meaning of this statement is not clear, as the cited NPS regulations were apparently not adopted until after the 1976 amendment added the "eligible for inclusion" provision.[xlii] Nevertheless, apparently relying on these regulations and existing case law, the court found that the term “eligible” in the statute does not require a formal determination of eligibility. After stating that the NHPA and its legislative history are silent with regard to the related question of "whether an agency may be required to review properties located in the vicinity of an undertaking to determine if any are eligible under established criteria," the court found that the statute was "ambiguous" on this point.[xliii] Therefore, the court deferred to the expertise of the Advisory Council under Chevron and upheld the requirements for identifying and considering potentially eligible properties in the Section 106 process.[xliv]

The court's analysis supporting its decision on this issue raises several concerns. First, there is in fact considerable legislative history that might have shed light on Congress' intention in adding the term "eligible for inclusion" to Section 106. Prior to 1976, when this phrase was added to the statute, Section 106 required agencies to consider effects only on historic properties officially included in the National Register. In considering the amendment to add the term "eligible for inclusion in" to Section 106, the Senate Committee Report accompanying the bill[xlv] stated that the major purpose of the bill was to establish the Advisory Council as an independent entity, separate from the Department of the Interior, and to increase funding to the state programs of historic preservation in order to allow them to complete the inventories of properties in their states.[xlvi] The committee report also described the amendment regarding the term "eligible for inclusion" in the following terms:

> A number of other "housekeeping" amendments should be considered, relating to such matters as transfer of employees, hiring of consultants, procedures for requiring agency comments on properties determined eligible for inclusion in the National Register and increasing membership on the Council.[xlvii]

Thus the 1975 Senate Committee Report seems clear on two points: (1) the addition of the phrase "eligible for inclusion" to Section 106 was a mere housekeeping amendment, and (2) the amendment was intended to refer to properties "determined eligible" for the National Register.

The Senate Committee's description of this amendment is significant. Prior to the 1976 amendment, Section 106 applied only to the approximately 12,000 properties that were then listed on the National Register.[xlviii] In its 1976 Report to Congress, the Advisory Council recognized that the registry of historic properties was still incomplete and estimated that to total number of properties in the entire country that should be included in the National Register might number as many as 50 to 67, 000.[xlix] An amendment intended to include all potentially eligible properties that meet the National Register criteria would have instantly added hundreds of thousands, millions or even scores of millions of properties to the ambit of Section 106.[l] It is not difficult to judge which interpretation more closely fits the description of a "housekeeping" amendment.

This interpretation, that "eligible for inclusion" added in 1976 to Section 106 meant determined eligible by the Secretary of the Interior, is strongly supported by the history of the Section 106 rules themselves. In fact, at the time of the 1976 amendment to the statute, the Advisory Council's section 106 rules contained that very definition at section 800.3(f):

> "Property eligible for inclusion in the National Register" means any district, site, building, structure or object which the Secretary of the Interior determines is likely to meet the National Register Criteria. As these determinations are made, a listing is published in the Federal Register on the first Tuesday of each month, as a supplement to the National Register.[li]

This definition was in effect for five years, from January 1974 to January 1979. Just as significant, however, is the fact that just before the 1976 amendment, the Advisory Council asked Congress only for a limited expansion of Section 106 to include only properties determined eligible by the Secretary of Interior. In its 1975 Report to Congress, the Advisory Council said:

> While the National Register is incomplete, a mechanism needs to be established to make certain that properties that may eventually be listed in the National Register are not destroyed before they can be evaluated. . . .
>
> The current program requires federal agencies to obtain determinations of National Register eligibility from the Secretary of the Interior for historic properties that may be affected by the agencies' projects. . . . At present it is moderately successful. The shortcoming can be traced to the fact that that the requirement of seeking eligibility determinations derives from procedures of the Advisory Council and not from any clear statutory directive. This leaves compliance essentially a matter of agency discretion.[lii]

Thus, when the Advisory Council approached Congress in 1976, it acknowledged that it had been applying Section 106 beyond the clear meaning of the statute's authorization and it was asking for a limited amendment to require agencies to

comply with its policy. It is very clear, however, that the policy that the Advisory Council sought to enforce was to require agencies to obtain determinations of eligibility, not to evaluate eligibility on their own under Section 106.

In 1979 the Advisory Council promulgated an entirely new definition in section 800.3(f). The term defined by the section was changed to "eligible property" and the definition was changed to "any [property] that meets the National Register Criteria."[liii] Notwithstanding the enormity of its scope, this change in policy was accomplished without any authority from Congress or any corresponding change of the terms of Section 106.

In NMA v. Slater, the court asserted that "under both the regulations of the [National Park Service] and the [Advisory Council], it is the agency itself, in consultation with the SHPO that may apply the National Register Criteria for Evaluation to determine the eligibility of an historic property."[liv] That is certainly true for the Advisory Council's regulations. National Park Service regulations, however, define "determination of eligibility" to be a decision made by the Interior Department, not by other agencies or the SHPO.[lv] Moreover, the NPS regulations cited by the court for the proposition that any federal agency can determine eligibility, in fact describe how a federal agency may request a formal determination of eligibility from the Interior Department.[lvi] The NPS regulations make clear that, even where an agency and SHPO agree that a property may be eligible, such agreement must be confirmed by a determination performed by the Keeper of the National Register.[lvii]

In addition, the case law cited by the court in support of its ruling is not applicable to this precise point. The opinion cites the cases of Boyd v. Roland[lviii] and Colorado River Indian Tribes v. Marsh[lix] for the proposition that Section 106 applies to properties that meet the National Register criteria without regard to any formal determination of eligibility.[lx] Both cases, however, rely on the Section 106 regulations for their ruling. Neither one addresses questions about the meaning of the term "eligible for inclusion in" relying only on the NHPA and its legislative history, or whether the Advisory Council's rules go beyond the interpretable limits of the statute.[lxi]

The court's ruling on determination of eligibility is therefore based on two uncertain findings. First, in the face of contrary indications in the legislative and regulatory history, the court concluded that any property that meets the National Register criteria is eligible, without the necessity of a formal determination by the Keeper. Second,

the court found that the statute and legislative history are silent on the question of whether agencies can be required, even in light of the first finding, to perform laborious evaluations of all nearby properties to determine potential eligibility, and therefore the statute was "ambiguous" as to whether an agency must do so.[lxii] Based on these findings, the court upheld this requirement in the rule based on Chevron deference and the fact that such a ruling appears to further the express purposes of the NHPA.

These last two findings are also subject to question. The first is because Chevron deference should not be applied in support of regulations that are outside the scope of the agency's legal authority.[lxiii] The second is treated below.

4. Furthering the purposes of the NHPA. The court's conclusion that the identification requirement furthers the purposes of the NHPA is both somewhat circular, and insufficiently supported in the opinion and the briefs.

It is circular because the answer to the question of whether the Advisory Council's rule furthers the purposes of the NHPA depends in part on the answer to the question of what Congress intended by adding the phrase "eligible for inclusion ." to Section 106. If Congress intended that agencies consider only historic properties that had been formally determined to be significant after careful review and determination by the Keeper, the Advisory Council's overbroad interpretation might in fact undermine the purposes of the NHPA.

Certainly in the area of wireless telecommunications infrastructure, the requirement that FCC applicants identify and document every property within the area of potential effects of a tower project (an area sometimes many miles in diameter), including those properties not potentially eligible, often results in enormous waste and unnecessary effort. The growing recognition of this fact weakens confidence in the whole Section 106 process. This is particularly true where too often SHPOs do not record or preserve these findings in the public record, and where apparently very few of the properties identified to the SHPO as supposedly "eligible" in tower-project consultations are ever actually nominated by the SHPO to the National Register as the law requires.[lxiv]

One can understand the desire, apparent in the Advisory Council's Section 106 rules, to stretch the Section 106 process as much as possible to require government agencies and their applicants to perform needed surveys of historic properties, and to identify

and evaluate cultural resources. Without a rigorous, thorough and professional identification effort, a complete inventory of potentially important historic properties, and determination of which of those deserve listing on the National Register, the goals of Section 106 cannot be attained.[lxv] And despite the framework in the NHPA to accomplish this task, and much effort toward that goal, neither the inventory nor the National Register have apparently come close to completion in the nearly 35 years since the NHPA was adopted.[lxvi] Requiring federal agencies to perform identification efforts for their undertakings, therefore, could prevent inadvertent damage to or destruction of important historic properties. It seems that this view supports the conclusion that the rules advance the purposes of the NHPA

On the other hand, the responsibility for completing the survey of historic properties was originally vested with the SHPOs. If the policy of relying on federal agencies to perform much of this crucial identification work as part of their Section 106 responsibilities is allowed to continue, the burdens of that policy will inevitably increase and the inefficiencies of that process will become more apparent and less bearable. In short order, these problems could easily overwhelm the perceived benefits of the policy, if they have not done so already.

In addition, and as an unavoidable consequence of this policy, the ruling on "procedure versus substance" in NMA v. Slater logically and necessarily takes an important part of the decisionmaking on historic-property identification out of the hands of the trained professionals in SHPO offices and the Advisory Council, and puts it in the hands of federal agencies and their applicants.

These realizations raise several new questions about the Advisory Council's policy on historic property identification, including whether or not its consequences were foreseen, whether the policy's potential costs now clearly outweigh its presumed benefits, and if this policy truly furthers the purposes of the NHPA.

Conclusion

The case of NMA v. Slater was a win for the defense. But the plaintiffs also won on several important issues, and some of these could cause significant changes in the Section 106 process. It is also apparent that questions raised by the court's opinion should be tested and decided in future cases, as the telecommunications infrastructure industry gains experience with the Advisory Council's Section 106 rules.

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[i] 2001 U.S. Dist. Lexis 14694 (2001) ("NMA v. Slater").

[ii] 16 U.S.C. §§ 470 – 470w.

[iii] 16 U.S.C. §§ 470 - 470w.

[iv] NMA v. Slater, 2001 LEXIS 14694 at *46.

[v] Id. at *62-*66..

[vi] Id. at *73-*75.

[vii] 47 U.S.C. § 151 *et seq*. NMA v. Slater, 2001 LEXIS 14694 at *75-*77.

[viii] Id. at *81.

[ix] Id. at *80.

[x] Id.

[xi] Id. at *82-*85.

[xii] U.S. Const., Art II, § 2, cl. 2.

[xiii] 65 Fed. Reg. 77698 (December 12, 2000).

[xiv] 424 U.S. 1 (1976).

[xv] NMA v. Slater, 2001 LEXIS 14694 at *86,*87.

[xvi] 467 U.S. 837 (1984).

[xvii] *Id.* at 844.

[xviii] NMA v. Slater, 2001 LEXIS 14694 at *52-*54.

[xix] *See* Defendant's Memorandum in Support of Defendant's Motion to Dismiss or in the Alternative, for Summary Judgement, at 9-17

[xx] NMA v. Slater, 2001 LEXIS 14694 at *60.

[xxi] 36 C.F.R. § 800.4(d)(2).

[xxii] 36 C.F.R. § 800.5(c)(2).

[xxiii] Id. at § 800.5(c)(2)(i).

[xxiv] Id. at § 800.5(c)(2)(ii).

[xxv] Id. at § 800.5(c)(2)(iii).

[xxvi] NMA v. Slater, 2001 LEXIS 14694 at *61.

[xxvii] 42 U.S.C. §§ 4321-4325.

[xxviii] *See* Application of Missouri RSA No. 7 Mid-Missouri Cellular for Mobile Radio Service Authorization, Memorandum Opinion and Order, 13 FCC Rcd 15390 (1998).

[xxix] NMA v. Slater, 2001 LEXIS 14694 at *46.

[xxx] Id. at *50.

[xxxi] Dep't of Defense v. Federal Labor Relations Authority ("FLRA"), 659 F2d 1140 (D.C. Cir. 1981).

[xxxii] Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

[xxxiii] NMA v. Slater, 2001 LEXIS 14694 at *48.

[xxxiv] Id. at *52.

[xxxv] *See* 36 C.F.R. §§ 800.4(c)(1) and 800.5(a).

[xxxvi] Dep't of the Treasury v. FLARE, 857 F.2d 819, 821 (D.C.Cir. 1988)

[xxxvii] *Id.*

[xxxviii] NMA v. Slater, 2001 LEXIS 14694 at *53, *54.

[xxxix] Dep't of theTreasury, note 34 *supra*. at 857 F.2d 821.

[xl] NMA v. Slater, 2001 LEXIS 14694 at *67.

[xli] Id. at *68.

[xlii] 42 Fed. Reg. 47661, (Sept. 21, 1977).

[xliii] NMA v. Slater, 2001 LEXIS 14694 at *70-*71.

[xliv] NMA v. Slater, 2001 LEXIS 14694 at *71-*73.

[xlv] S. Rep. No. 367 (94th Cong., 1st Sess.): To accompany S. 327 (amending the Land and Water Conservation Fund Act of 1965, as amended, and establishing the National Historic Preservation Fund) as amended and reported by the Senate Interior and Insular Affairs Committee, September 11, 1975 ("Senate Committee Report").

[xlvi] 1975 Senate Report at 11-13. Section 101(b()3)(a) (16 U.S.C. § 470a(b)(3)(a)) states: "It shall be the responsibility of the State Historic Preservation Officer to . . .direct and conduct a comprehensive statewide survey of historic properties and maintain an inventory of such properties."

[xlvii] *Id.* at 13 (emphasis supplied).

[xlviii] Advisory Council on Historic Preservation, "The National Historic Preservation Program Today" January 1976 ("1976 Report to Congress") at 25.

[xlix] *Id.*

[l] In 1976, the Advisory Council estimated that perhaps 670,000 properties of some significance would eventually be included in a comprehensive national inventory, and perhaps 67,000 in the National Register. 1976 Report to Congress at 12. Of course, the current Section 106 rules seem to require evaluation of virtually every older man-made structure, not just those of determined significance. At least one court has noted that "[a] literal construction of the phrase "eligible for inclusion in the National Register would, under the broadly stated criteria for eligibility . . .lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion in the Register." Birmingham Realty Co. v. Gen'l Services Admin., 497 F. Supp. 1377, 1388 (N. D. Ala, S.D. (1980).

[li] 36 C.F.R. § 800.3(f) (1976)(emphasis supplied). Originally published at 39 Fed. Reg. 3367, Friday, January 25, 1974.

[lii] 1976 Report to Congress at 27 (emphasis supplied).

[liii] 36 C.F.R. § 800.3(f)(1980), *citing* 44 Fed. Reg. 6072, Jan. 30, 1979.

[liv] NMA v. Slater, 2001 LEXIS 14694 at *69, note 31.

[lv] 36 C.F.R. § 60.3(c).

[lvi] *See* 36 C.F.R. § 63.2.

[lvii] 36 C.F.R. § 63.3 provides that even when the agency and SHPO agree that a property is eligible, they may be informed by the Keeper that the property has not been "accurately identified and evaluated." In such case, the rule provides that the federal agency and the Keeper "may consider the property eligible" but only for the purpose of obtaining comments from the Advisory Council.

[lviii] 789 F.2d 347, 349 (5th Cir. 1986).

[lix] 605 F. Supp.1425, 1437 (C.D. Cal. 1985).

[lx] NMA v. Slater, 2001 LEXIS at *69, note 31.

[lxi] The Boyd court said "[a]plain reading of section 106 and its regulations, as amended, persuades us that a property qualifies as eligible property on the basis of literal eligibility under the National Register criteria. 789 F2d at 349 (emphasis supplied)(The language underlined here was omitted from the NMA v. Slater opinion). The Colorado River Tribes v. Marsh opinion likewise relies on the Advisory Council's definitions and language to support its holding on this point. 605 F. Supp. at 1437, 1438.

[lxii] NMA v. Slater, 2001 LEXIS 14694 at *71.

[lxiii] Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D. D.C. 1995); Motor Vehicles Mfrs. Ass'n., v. State Farm Mutual Ins. Co. 463 U.S. 29, 43 (1983).

[lxiv] Section 101(b)(3)(A) of the NHPA states: "It shall be the responsibility of the State Historic Preservation Officer to . . . identify and nominate eligible properties to the National Register . . ." 16 U. S. C. § 470a(b)(3)(A). The regulations of the NPS provide: "The SHPO is responsible for identifying and nominating eligible properties to the National Register." 36 C.F.R. § 60.6(a).

[lxv] *See* 1976 Report to Congress at 11-16.

[lxvi] In 1976, the National Park Service estimated that the National Register would "level off" at about 67,000 properties, or one tenth of those with some significance, and that these should be identified by the late 1980s. 1976 Report to Congress at 25. Today, there are nearly 75,000 properties included in the National Register.